Manitoba

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Law Reform Commission

Commission de réforme du droit

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DISCUSSION PAPER:

TOWARDS A NEW MANITOBA REAL PROPERTY ACT

January, 1991

The Manitoba Law Reform Commission was established by *The Law Reform Commission Act* in 1970 and began functioning in 1971.

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Unless clearly marked to the contrary, the Commission will assume that comments received are not confidential and that commentators agree to the Commission quoting from or referring to their comments, in whole or in part, and to the comments being attributed to them. However, requests for confidentiality or anonymity will be respected to the extent permitted by *The Freedom of Information Act*.

We request that comments be submitted to the Commission not later than May 31, 1991.

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PREFACE

This Discussion Paper accompanies a Report, *Renovating the Foundations: Proposals for a Model Land Recording and Registration Act*, a report of a committee made up of nominees of governments and law reform agencies of a number of Canadian jurisdictions.

That Report sets forth the core provisions of a Model Land Recording and Registration Act, designed to be capable of enactment in identical, or closely similar terms, in the various provinces and territories.

The Manitoba Law Reform Commission is inclined to the view that the Model Act would clarify and improve the law of Manitoba and offer the further advantage, if it were widely adopted, of greater uniformity of law and practice in Canadian jurisdictions.

However, before proceeding to final consideration of the Joint Land Title Committee's Report, the Commission will review the Model Act in light of the comments which it receives and consultations which it will hold.

The purpose of this paper is to introduce the Report and Model Act and to invite comments on the proposals.

INVITATION TO COMMENT

The Commission will welcome comments and suggestions from interested persons.

It will be helpful to be informed of favourable assessments as well as of objections or suggestions for amendment.

Comments should be sent to:

Manitoba Law Reform Commission
12th Floor
405 Broadway
Winnipeg, Manitoba
R3C 3L6

Unless clearly marked to the contrary, the Commission will assume that comments received are not confidential and that commentators agree to the Commission quoting from or referring to their comments, in whole or in part, and to the comments being attributed to them. However, requests for confidentiality or anonymity will be respected to the extent permitted by *The Freedom of Information Act*.

We request that comments be submitted to the Commission not later than May 31, 1991.

CONSULTATION

The Commission hopes to organize at least one forum for intensive discussion of the Report by legal practitioners and others with special interest and experience in titles law and conveyancing. Persons wishing to take part in such a study are asked to inform the Commission before February 28, 1991.

CHAPTER 1

INTRODUCTION

A. PURPOSE OF THIS PAPER

The purpose of this Discussion Paper is to make known to readers the Report of the Joint Land Titles Committee, entitled *Renovating the Foundation: Proposals for a Model Land Recording and Registration Act*, a copy of which accompanies the Paper, and to invite comment on the Report and the Model Land Recording and Registration Act.

The Commission is inclined to the view that Manitoba should enact a statute along the general lines of the proposed Model Act in place of the existing *Real Property Act*, but before proceeding to prepare a formal Report will review the issues in light of comments received and views expressed in consultations with interested parties.

This Paper discusses some Manitoba law and compares it to the Model Act to indicate the character and effect of some of the provisions of the Model Act. However, it does not purport to discuss, nor even to summarize, every part of the Joint Committee's Report or of the Model Act. (For example, it makes no reference to the form of the register or the problem of conflicting registers and does not consider overriding interests in detail.) For a full view of the purposes and form of the proposed legislation, the full report of the Joint Committee, including the Model Act and commentary on its provisions, must be read. A less complete, but still informative overview can be found on pages 4 to 41 of the Report.

B. THE JOINT LAND TITLES COMMITTEE

The Joint Committee, established in 1988 following discussions begun on the initiative of the Alberta Law Reform Institute, includes Registrars-General or other representatives of the governments of all the provinces and territories of Canada except Quebec and Newfoundland (the Maritime provinces being represented through the Council of Maritime Premiers). It also includes representatives of the law reform agencies of British Columbia, Alberta, Saskatchewan and Manitoba.

The members of the Joint Committee from Manitoba are Professor D.T. Anderson, Q.C., M. Alexandra Morton, Q.C. and R.M. Wilson.

The Joint Committee is chaired by Mr. W.H. Hurlburt, Q.C., a former President of the Law Society of Alberta and the Federation of Law Societies of Canada, and has had the benefit of the special expertise in titles law of Professor T.W. Mapp, author of a leading study of Torrens title registrations systems. While the report is a collegial product, the Joint Committee acknowledges the special contribution of Professor Mapp to drafting of the Model Act and of Mr. Hurlburt in drafting the Report, the annotations to the Model Act and a text used as the basis for this Discussion Paper.

C. THE SCOPE OF THE JOINT COMMITTEE'S REPORT

The Real Property Act includes much on administrative procedure. The Model Act provides in broad outline for registrars and land registration offices, but contemplates that other administrative matters will be relegated to, and properly belong in, regulations. Such regulations will be required.

Land titles acts commonly include provisions affecting substantive law or regulating procedures in various matters going beyond the central requirements or features of registration and recording systems. For example, *The Real Property Act* has extensive provisions with respect to mortgage sale and foreclosure proceedings. Existing provisions affecting substantive law or regulating other matters or proceedings will have to be identified and re-enacted, either in separate legislation or in further and separate parts of a revised *Real Property Act*. It will also, in Manitoba, be necessary to continue legislative provisions concerning the bringing of "Old System" (deeds registry) lands under the "New System" (titles system).

The Model Act does not include transitional provisions dealing with the effect on existing rights of any changes in current interest and title recording law. One example of such a change may be the protection that the Model Act would give to volunteers. Transitional provisions will be required.

The Model Act does not deal with limitations of actions affecting land. The Joint Committee thinks these would more appropriately be dealt with in a general limitations statute.

The Model Act would subject registered titles to only a limited list of overriding interests. That list does not include all the unregistered or unrecorded interests (for example, easements) that may operate against title under the existing *Real Property Act*. This matter will require particular attention.

If a statute along the lines of the Model Act is to be enacted, it is obvious that transitional and special provisions will need a good deal of work. They will, however, be manageable. The Commission has already identified a number of such matters that will require study, but will welcome comments drawing attention to particular points which will have to be attended to.

The attached Report and the Model Act do not purport to deal with these points. They are concerned with the core provisions and principles of a modern title registration and interest recording system.

D. UNIFORMITY OF LAW

The first purpose of the Model Act is to make the land titles system more efficient and to enable users to use it more easily and confidently. It states basic principles more coherently than does the existing statute. It tries to solve unsettled problems or issues. It suggests some policy changes to adapt the law to perceived current and future needs.

However, a second purpose is to achieve uniformity, or at least great harmony, of title registration laws in Canada. Today, even those statutes that are based on the Torrens model of title registration differ in various particulars, some of which have been held by courts to be significant. As a result, judicial interpretations of the statute in one province have to be read cautiously before being accepted as authority for the interpretation of the statute of another province, and parties in one province concerned with land transactions or securities in another province may not be aware or certain of the applicable law. Uniformity, or closer similarity, of laws will promote business efficiency and the development of common jurisprudence.

E. LAND DESCRIPTIONS AND REGISTERS

The Model Act provides for the continuation of current plan-based systems for the identification of parcels of land.

The Model Act provides that registers are to be created for all land which is subject to the Act, but leaves all matters of detail and procedure to regulation and administrative decision. In the opinion of the Joint Committee, based on advice received, the proposals are compatible with administrative arrangements and formats for registration and recording now in place, or likely to be adopted, including "electronic" or computer-based systems.

F. "TITLE REGISTRATION" AND "INTEREST RECORDING"

If there is one main key to understanding the structure and provisions of the Model Act, it is the distinction drawn between "recording" and "registration". This is explained more fully below, and in detail in the Report, but will be best understood by those familiar with *The Real Property Act* as corresponding, generally speaking, to the difference under existing law between the effects of filing a caveat and the effects of a formal registration.

G. THE EXTENT OF PROPOSED CHANGE

The Model Act is designed to resolve some matters left unsettled or unclear in the interpretation of existing law and, on some points, for reasons of policy, to alter the law. Broadly speaking, however, it carries forward the principal features of the current Manitoba law, as settled and understood on the basis of the evolution and interpretation of *The Real Property Act*. Accordingly, while its structure and terminology may appear unfamiliar, its main provisions are unlikely to appear unusual or novel to those acquainted with the current law and practice in Manitoba. It may, indeed, be closer to the established law of Manitoba than to the law of some other provinces, even those with Torrens type land titles statutes.

CHAPTER 2

INTEREST RECORDING AND TITLE REGISTRATION IN MANITOBA

A. REASONS FOR A REVISED INTEREST RECORDING AND TITLE REGISTRATION STATUTE

The Manitoba interest recording and title registration system has, on the whole, served the province well. It has proved flexible and capable of evolving to meet changing circumstances. However, its formal legal foundation, *The Real Property Act*, still reflects discarded notions from earlier times, and the successful evolution of the system has been accomplished by judicial, professional and administrative creativity, which has been hampered rather than facilitated by the statute. A new statement of the law, rationalized and brought into line with the evolving Manitoba system, is needed. Specific problems have been dealt with from time to time by specific amendments to *The Real Property Act* but the statute as a whole is not a satisfactory foundation for a modern system.

B. EVOLUTION OF INTEREST RECORDING AND TITLE REGISTRATION LEGISLATION IN MANITOBA

1. Historical Origins of *The Real Property Act*

The current statute derives from the Manitoba *Real Property Act* of 1885[1], which was based upon Australian Torrens models.

The title registration statutes of Manitoba, Saskatchewan and Alberta and the federal *Land Titles Act* which applies in the two territories are similar, but not identical. The British Columbia statute, although often characterized as a Torrens statute, has developed along somewhat different lines. The Ontario title registration statute is based, historically, on a different, English, model.

For present purposes, it will not be necessary to examine the differences between all these statutes, or between them and systems and statutes in other jurisdictions. However, it will be helpful to give a brief account of the Manitoba land titles system, its origins as a Torrens-type statute and its evolution into the (quite different) system in effect today.

2. Torrens Principles

Under the general law, a person proposing to purchase an interest in land had to satisfy himself or herself as to the identity and capacity of the person with whom he or she was dealing, the validity of the deed or instrument made by that person and, because at common law the purchaser could only obtain what the seller had to convey, the entitlement of the vendor to the interest. To prove ownership, a long series of documents from previous transactions,

[1] *The Real Property Act*, S.M. 1885, c. 25.

constituting the seller's "chain of title", had to be examined. These could be numerous and flawed. Moreover, there was no assurance that the vendor or some prior owner had not granted conflicting interests to others that were not disclosed but which, because of doctrines of notice developed in the courts of equity, might later prevail over the interest of the purchaser. The process was expensive and time-consuming and full certainty of ownership was difficult, if not impossible, to achieve.

An attempt to address these problems was made in legislation first proposed for adoption in South Australia in the nineteenth century by Sir Robert Torrens, and adopted, after considerable revision, in that State and other Australian States.

The essential feature of a pure Torrens system is a state-operated register which is the source of all rights in land. The register says who owns each parcel of land and what rights in the land are held by others. The register's statement that O owns Blackacre is a statement of the law. Upon every transfer of the fee simple absolute, title is surrendered to the Crown and regranted to the transferee.[2] The only concession to unregistered interests is that a caveat, caution or notice in the register will preclude subsequent conflicting registrations for a specified period of time or until the caveator has been given notice to come forward and prove the validity of the interest claimed.

Torrens, the originator of the Torrens system, wanted to enable landowners to do their own conveyancing. The original Torrens statutes therefore prescribed forms for use for land transactions. This limited the number of kinds of transactions the system could effectively cope with.

3. Departures from Torrens Principles

In Manitoba, a register composed of certificates of title is the centrepiece of the title registration system. A statement in the register that O is the owner of Blackacre as conferred by a registered instrument is also a statement of law. This is all in accordance with Torrens system theory. However, the Manitoba system of land titles (as well as the other Canadian systems) has evolved in ways not contemplated by Sir Robert Torrens and is very different from the system which he contemplated.

The most important departures from the original Torrens system are:

(1) Manitoba law recognizes unregistered interests. An unregistered conveyance immediately confers an interest. The interest so conveyed is vulnerable to the registration or caveating of conflicting interests, but in the meantime it is fully effective.

(2) Manitoba law provides a system of protection of the priority of unregistered interests through the caveat. The caveat is used as a permanent form of protection for unregistered interests. It is not a mere blocking device to give a claimant time to perfect an interest, as it is under a pure Torrens system.

(3) Although Manitoba law, through regulations in *The Real Property Act*, prescribes forms for registered documents, conveyancers can add provisions at will (though they may encounter difficulties if the added provisions change the legal nature of the interest conveyed).

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[2]Torrens, *South Australian System of Conveyancing by Registration of Title* 34.

4. Continuing Uncertainties

It is remarkable, considering the length of time that *The Real Property Act* and similar statutes have been in force, that on a number of important issues (further discussed below and in the Report), the law has never been settled conclusively by authoritative interpretation. For example:

1. Is a purchaser still bound to satisfy himself or herself as to the identity and capacity of the vendor; and if a purchaser becomes registered on the basis of a transfer that is forged (or otherwise would be void at law), is the title thus created indefeasible, or only an apparent but revocable title that may be the basis for a later unimpeachable title created by a further valid transfer to a subsequent purchaser?

2. When a number of persons hold different unregistered interests, some granted by the registered owner and others held by virtue of subsequent assignments of interests initially granted by the registered owner, what is the effect if one interest holder files a caveat against the title? Does the filing protect all the interest holders against subsequently created interests, but maintain unchanged the relative common law priorities of the previously created interests, or does the caveator gain priority over all interests? Does it matter if the caveator knew of the other interests existing when the caveat was filed?

3. *The Real Property Act* says that knowledge of other unregistered interests does not by itself constitute "fraud" on the part of a person who registers an interest with such knowledge; but what else then is required to establish "fraud"?

The Model Act addresses these and other uncertainties.

CHAPTER 3

SOME COMPARISONS BETWEEN EXISTING LAW AND THE MODEL ACT

A. RECOGNITION OF UNREGISTERED INTERESTS

The relevant section of some Acts (for example, section 56 of the Alberta *Land Titles Act*) appears to say that a conveyance passes no interest until registered. Section 66(4) of *The Real Property Act* of Manitoba is to the effect that an unregistered interest in land is ineffective against a bona fide transferee thereof, and section 78 suggests that, even unregistered, an instrument operates in favour of the person intended to take under the instrument. However, even in Alberta, courts have recognized, as they have even more readily in Manitoba, that it is not necessary for the purposes of interest recording and title registration, to invalidate unrecorded and unregistered interests. All that is necessary is to enable persons who acquire interests in land to avoid being subjected to unrecorded and unregistered interests. The existing law recognizes this, but it does so in the teeth of the Acts in some jurisdictions, and, in Manitoba, on the basis of a rather obscurely worded section.

The Manitoba law, as *The Real Property Act* has been interpreted, is that an interest is effective from the time of the transaction and interests will be enforced in accordance with common law priorities - subject to the effect, under the Act, of recording and of registration of conflicting interests.

The Model Act (Model Act 4.5(1)) adopts and continues this provision.

B. EFFECT OF CAVEATING/INTEREST RECORDING

The Manitoba caveat system is a system for protecting the relative priorities of interests in land. The interest recording system described at pages 13 to 18 of the Joint Committee's Report and provided for in Part 4 of the Model Act which, with annotations, appears at pages 67 to 85 of the Report, is essentially the same as the caveat system, but instead of filing a caveat to protect the interest, the claimant will "record" the interest.

A caveat under the original Torrens system was (and under some current title registration systems is) a temporary device to freeze the title situation on the register until a claimant of an interest in land could take legal steps to protect the claim. Either a short time limit is imposed within which the caveator must commence legal proceedings on the interest, or the Registrar is forbidden to make any entries while the caveat is in force, or both; either device prevents a caveat from giving more than short-term protection.

The situation is very different in Manitoba. Section 155 of *The Real Property Act* provides that the filing of a caveat gives the same effect as to priority as the registration of an instrument

under the Act. While the interpretation of this section is not beyond dispute,[1] it is accepted law that the registration of a caveat has two effects. First, it preserves the priority of the caveated interest over subsequent interests. Second, it confers upon the caveated interest priority over prior interests which have not been registered or caveated, but only if the caveated interest was obtained for value and without fraud.[2]

Section 152 of *The Real Property Act* provides that "so long as a caveat remains in force, the district registrar shall not register an instrument purporting to transfer, mortgage or encumber the land, mortgage, encumbrance or lease unless the instrument is expressed to be subject to the claim of the caveator". In Alberta, in recognition of the fact that the liberal direction of the equivalent section was universally ignored in the interest of efficient conveyancing, the section was changed to conform to actual practice and simply provides that so long as a caveat is in force an instrument subsequently registered is subject to the claim of the caveator.

There being no time limit on the effectiveness of a caveat, these provisions, and the practices of conveyancers and registrars, have poured into the old bottle of the Torrens short-term blocking caveat the new wine of a comprehensive and long-term system of protection of priorities of unregistered interests.

The registration of a caveat does not confer an interest upon the caveator, nor does the discharge of a caveat of itself terminate the caveator's interest. Further, there is good authority for the proposition that if a caveat is discharged but the underlying interest is not extinguished, the underlying interest maintains its priority over any interest which was registered or caveated during the currency of the caveat.[3]

While the point has not arisen in the reported cases, the interest of a purchaser who, during the course of the purchase transaction, receives and registers a forged discharge of a prior interest, may well be subject to the caveated interest despite the removal of the caveat from the register. If the caveated interest would have been entitled to priority at common law, the purchaser may not even have a claim against the assurance fund for compensation for the resulting loss.

Under section 4.5(2) of the Model Act, the "recording" of an interest will confirm the priority of a prior interest, and will confer priority upon a subsequent interest which has been obtained for value without fraud. It will not confer an interest. The cancellation of a recording, under section 4.7(2), will not of itself terminate the interest, and under section 4.7(3), it will not affect the priority of enforcement rights which have accrued before the cancellation. It is these provisions which make the proposed recording system essentially the same as the caveat system. Section 7.1(2) of the Model Act would, however, go on to provide compensation for a purchaser who has relied on a forged request for cancellation of a recording during the course of the purchase.

If caveating an interest protects the existing priority of the caveated interest over existing and future subsequent interests, and if it also confers priority over any existing unregistered and

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[1]See, for example, the dissenting judgment of Stuart J. in *Re Royal Bank of Canada and La Banque d'Hochelaga* (1914), 7 W.W.R. 817 (Alta. S.C. App. Div.) in which he held that a caveat was intended "to keep things exactly as they are and no more", i.e. the registration of a caveat, in his view, did not interfere with the existing priority of another unregistered and uncaveated interest.

[2]This is widely assumed to be the law, but the relevant authorities are less than clear and conclusive. Two decisions that are generally taken to have established these propositions are *Stephens* v. *Bannan and Gray* (1913), 5 W.W.R. 201 (Alta. S.C. *en banc*) and the *Royal Bank* case mentioned in the preceding footnote. In the *Stephens* case, the interest prior in time was caveated first; in the *Royal Bank* case, the caveated interest of La Banque d'Hochelaga took priority over both the prior unregistered and uncaveated equitable mortgage in favour of the Royal Bank and the subsequent registered mortgage in favour of the Royal Bank.

[3]See *Passburg Petroleums Ltd.* v. *Landstrom Developments Ltd.*, [1984] 4 W.W.R. 14 (Alta. C.A.); *Bensette* v. *Reece*, [1973] 2 W.W.R. 497 (Sask. C.A.).

unrecorded prior interests, it acts very much like registering an instrument under a deed registration system, which is one form of an interest recording system. Indeed, that is the case. *The Real Property Act* thus provides an existing interest recording system as well as a title registration system. It does not, however, do so in a clear and comprehensive way. Part 4 of the Model Act would substitute a clearer and more comprehensible interest recording system which in essence is the same as the present caveating system.

A comparison of some of the provisions of *The Real Property Act* and the Model Act follows. These relate to the essential nature of interest recording, and the reader is referred to Part 4 of the Model Act for other provisions.

The Real Property Act	**Model Act**
s. 148(1) A person claiming to be interested in land may cause a caveat to be filed.	s. 4.1 Any interest recognized under law (see Model Act s. 1(e) for the definition of interest) may be recorded.
s. 148(1) and regulations. A caveat must state the nature of the interest claimed and the grounds on which the claim is founded and must be in prescribed form.	s. 4.2(1) An interest may be recorded by means of a document in prescribed form which incorporates the document on which the interest is based or a copy thereof or which summarizes the transaction on which it is based.
	s. 4.5(4) The recording of a prior interest by summary is effective only as to the rights expressly described in the recorded document and only to the extent of the description of each right.
ss. 152 (interpreted) An instrument registered subsequent to a caveat is subject to the claim of the caveator.	s. 4.5(2) A subsequent interest shall be enforced with priority over a prior interest if the subsequent interest was
(It is understood, if not clearly worded, that the discharge of a caveat does not affect the priority of the caveated interest over subsequent interests which were caveated or registered before the discharge of the caveat.)	(a) obtained for value, (b) obtained without fraud, and (c) obtained and recorded at times when the prior interest was not recorded.
s. 155 Filing of a caveat has the same effect as to priority as the registration of an instrument.	

General statement	General statement
The registration of a caveat does not create or confer an interest and the discharge of a caveat does not terminate the recorded interest or affect priorities established before the discharge. Caveating deals and deals only with relative priorities of interests.	The recording of an interest will not create or confer an interest (see Model Act s. 4.5(2)), and the cancellation of a recording will not terminate the recorded interest (see Model Act s. 4.7(2)) or affect priorities established before the discharge. Recording deals and deals only with relative priorities of interests.

C. EFFECT OF REGISTRATION[4]

Under both *The Real Property Act* and the Model Act, registration both confers or confirms ownership and confers or confirms priority. *The Real Property Act* as written reflects original Torrens theories but, as the table below shows, it has been interpreted differently. The scheme of the Model Act is much the same as the scheme of the present law as it has evolved through judicial interpretations of *The Real Property Act* . The following table compares *The Real Property Act*, construed literally, with the law as it has evolved and with the legal situation proposed by the Model Act.

***The Real Property Act* as written (Torrens theory)**	***The Real Property Act* as interpreted (present law)**	**Model Act**
Some Acts provide:	Registered owner is legal owner of the registered interest. However, if the general law does not recognize the interest conferred by the instrument as one of the registerable interests, or if the general law does not recognize the registered owner as having legal capacity to own the interest, the registration will not be effective.	s. 5.3(1) Registered owner is legal owner of the registered interest if the interest is recognized under law and qualified for registration under s. 5.1 and if the registered owner has legal capacity to own the interest.
As soon as registered every instrument becomes operative according to tenor and intent and creates, etc., the estate or interest mentioned in the instrument.		
Termination of registration	Termination of registration	Termination of registration.
Divests interest.	Divests interest.	Divests interest: see Model Act s. 5.4(2).

[4]See T.W. Mapp, *Torrens' Elusive Title* (1978) Chapter 5 (Conferring Ownership by Registration) and Chapter 6 (Defeasibility of Ownership Conferred by Registration) (hereinafter "Mapp"); Joint Land Titles Committee, *Renovating the Foundation: Proposals for a Modern Land Recording and Registration Act for the Provinces and Territories of Canada* (1990) 18-26 (hereinafter "Report").

Registrable interests	Registrable interests	Registrable interests
Various sections of *The Real Property Act* provide for registration of a limited list of instruments other than caveats. These include such things as mortgages and leases.	Present law is in accordance with Act.	Model Act s. 5.1 provides a list of registrable interests somewhat more extensive than the list of interests registrable under *The Real Property Act*.
s. 64 Serial number assigned to instrument determines priority.	Present law is in accordance with Act.	s. 5.3(4) Registration records an interest and thus confers priority (though if the interest was previously recorded, it will upon registration retain the priority conferred by the earlier recording).
s. 59 Owner under certificate of title holds absolutely free of all other encumbrances, etc., except (a) encumbrances, etc., entered in register, (implied) (b) in case of fraud, (c) prior certificate of title, (d) s. 58 overriding interests.	The owner holds subject to the interests mentioned in section 59 as listed in left-hand column, and also to the following additional interests: (a) interests binding on owner. (b) if owner is a volunteer, interests binding upon the donor, (c) if owner was registered through error, the interest of the displaced owner in recovering the interest.	ss. 5.3-5.6 A registered interest upon registration is subject (see s. 5.3(6)) to (a) transactions which bind the registered owner, (b) conflicting interests entitled to priority, and (c) overriding interests. Situations in which registrations are subject to being revised are set out in ss. 5.4, 5.5 and 5.6 and include those under present law. However, s. 5.3(5) confers upon a registered volunteer or donee the same protection as the Model Act confers on a purchaser. s. 5.6 (conflicting registers) replaces the prior certificate of title exception.

D. VOLUNTEERS[5]

The Report and Model Act propose to extend to volunteers (those who have not given value for their interest) the same protection as those who purchase for value, where an interest is *registered*. The justification is that registrants, whether for value or not, contribute to the expense of the system and that, in practice, very often volunteers, believing they have secure titles, will make expensive improvements to the land or otherwise arrange their affairs in reliance on that belief. This changes the current law as expressed by the Supreme Court in *Kaup* v. *Imperial Oil Ltd.*[6]

The following table compares the provisions of *The Real Property Act* dealing with volunteers with the counterpart provisions of the Model Act.

***The Real Property Act* (as interpreted)**	**Model Act**
<u>Registered interests</u>	<u>Registered interests</u>
ss. 59, 62 generally, and 64 do not in terms exclude volunteers from their protection. However, some provisions of *The Real Property Act* do refer to the giving of value: (a) s. 62(1)(d) protects only registered owners "bona fide and for value", (b) s. 62(1)(c) protects a person deriving title through an owner who has obtained title by fraud only if the person is a transferee bona fide for value, (c) s.80 provides that a person taking a conveyance is not bound "to see to the application of the purchase money". The judicial interpretation is that *The Real Property Act* registration protects only owners who have given value: *Kaup* v. *Imperial Oil Ltd.*	s. 5.3(1) declares that the registered owner of an interest is the owner of the interest. s. 5.3(5) provides that "a registered interest has been obtained for value for the purposes of section 4.5". The effect is that a registered interest will have priority from the time of its registration (or prior recording) even if no value was actually given. This is a change of policy from the existing law. See the discussion of this subject at pp. 36-37 of the Joint Committee's Report.
<u>Caveated interests</u>	<u>Recorded interests</u>
s. 155 provides that filing a caveat has the same effect as to priority as the registration of an instrument. Given the interpretation of the provisions about registration of instruments, it seems likely that the registration of a caveat by a volunteer would be held not to give priority over a prior unrecorded and unregistered conflicting	s. 4.5(2(b)(i) confers priority upon a subsequent recorded interest over a prior unregistered and unrecorded interest only if value has been given for the subsequent interest. Since s. 4.5(1) declares that interests are to be enforced with priority according to law, subject to s. 4.5(2), and since s. 4.5(2) does not confer priority upon

[5]See Mapp at 56 and 121-129; Report at 36-37.

[6]*Kaup* v. *Imperial Oil Ltd.*, [1962] S.C.R. 170.

interest held by a purchaser for value.

a volunteer, the recording of a subsequent interest for which no value has been given will not confer priority over a prior interest.

E. FRAUD

The subject of fraud is discussed at pages 34 to 36 of the Joint Committee's Report and in the annotations to section 1.2 of the Model Act which appear at page 50. The Model Act adopts *The Real Property Act* policy that an owner who obtains registration by fraud is not entitled to the protection of the statute, and it adopts *The Real Property Act* policy of restricting the kinds of fraud which will have this effect as between a person who has achieved registration and the holder of a prior unregistered and unrecorded conflicting interest. It attempts, by the partial definition in section 1.2, to give greater precision to the notion of fraud in that kind of case.

The following table compares the provisions of *The Real Property Act* relating to fraud with the counterpart provisions of the Model Act.

The Real Property Act	**Model Act**
s. 155 would probably be interpreted as not conferring priority upon a caveated interest if the interest or the priority of recording was obtained by fraud, on the grounds that *The Real Property Act* s. 155 provides that filing a caveat confers the same priority as registration of an instrument, and registration of an instrument obtained by the grantee's fraud is an exception from indefeasibility.	s. 4.5(2)(b)(ii) confers priority upon a subsequent recorded interest over a prior unregistered and unrecorded interest only if the subsequent interest was obtained without fraud. Since s. 4.5(1) declares that interests are to be enforced with priority according to law, subject so s. 4.5(2), and since s. 4.5(2) will not apply in favour of a person who obtains an interest by fraud, the recording of a subsequent interest for which no value has been given will not confer priority over a prior interest.
Registration does not protect a registered owner who obtains registration by his or her fraud (see *The Real Property Act* ss. 59(1), 62(1)(c).	s. 5.4(1)(c) provides that registrations may be revised when a registration was obtained through the fraud of the registered owner.
The Real Property Act does not say anything about fraud as between immediate parties, so that the general law would presumably apply.	The Model Act does not say anything about fraud as between immediate parties, so that the general law would presumably apply.
s. 80 provides that, except in the case of fraud on his part, (a) a person taking a disposition from a registered owner of land is not affected by notice, direct, implied or constructive, of any trust or unregistered interest, and (b) the knowledge that any trust or unregistered interest in existence shall not of	s. 1.2 provides that (a) the doctrine of constructive notice is abolished for the purpose of determining whether conduct is fraudulent under the Model Act, (b) a person dealing with an owner is not affected by actual knowledge of an interest which is unrecorded and unregistered,

itself be imputed as fraud.

The Real Property Act does not say what it is that, in addition to knowledge, will make the person's conduct fraudulent. The effect of the judicial authorities cannot usefully be summarized here. The cases reflect various approaches, and are not easily reconciled.

(c) the person may assume without inquiry that the transaction is authorized by the owner of an unrecorded and unregistered interest and will not prejudice that interest, and has no duty to assure the proper application of assets paid or delivered to the owner, but

(d) the person obtains the interest through fraud if he or she had actual knowledge that the transaction was not authorized by the owner of the interest and will prejudice the interest.

F. UNAUTHORIZED TRANSACTIONS[7]

The subject of registrations which are not based on transactions valid under the general law is discussed at pages 24 to 26 of the Joint Committee's Report, and in section 5.6 of the Model Act and the annotations to it, which appear at pages 98 to 101. The paradigm example is a registration based upon a forged transfer, but there can be other cases, such as a case of *non est factum* or error in transcription by the land registration office.

The Real Property Act does not deal specifically with a registration based on an unauthorized transaction.

It was long thought, on the basis of *Gibbs* v. *Messer*,[8] that if A was registered without fraud on the basis of a void transaction (say, a forged transfer), A's title thus obtained was cancellable; but if A conveyed to B, a non-fraudulent purchaser for value, by a valid transfer, B would, when registered, have an indefeasible title. However, in *Frazer* v. *Walker*,[9] decided by the Judicial Committee of the Privy Council on Appeal from New Zealand, it was said that even A, if a purchaser for value without fraud, will obtain a protected title. This is now thought by many likely to be the law in Manitoba, but this has never been authoritatively so held. It implies that, under *The Real Property Act*, a purchaser may not only rely on the existing title as proof of the ownership of the vendor (or apparent vendor), but also no longer has to satisfy himself or herself as to the identity and capacity of the vendor and the validity of the instrument made in favour of the purchaser.

The Model Act (section 5.6) provides that, if a registration was not authorized by a valid transaction but was requested by the registered owner in the belief that it was authorized by a valid transaction and without knowledge of the facts which rendered the transaction invalid, either the registered owner or the owner who has been deprived or subordinated by the registration may bring an action to resolve the matter.

This raises another question. Transactions may be invalid for various reasons. In the case of forgery, the forger seeks to victimize both parties: the previous registered owner, whose title is cancelled when the forged transfer is registered, and the purchaser, whose money the forger takes. Is it right that one of the two - the previous registered owner or the newly registered

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[7]See Mapp at 103-109 and 129-134; Report 24-26.

[8]*Gibbs* v. *Messer*, [1891] A.C. 248 (P.C.).

[9]*Frazer* v. *Walker*, [1967] 1 A.C. 569 (P.C.).

owner - should get the land and the other be left with nothing? Or, if it is decided that if one gets the land and the other should have monetary compensation, that in all cases A should get the land and B the compensation, or vice versa?

The Report suggests that a court should have some flexibility or discretion in reaching an appropriate solution. The Model Act provides that the deprived or subordinated owner will be entitled to have registrations revised to nullify the effects of the unauthorized registration, unless the court, having considered specified circumstances and any others that are relevant, decides that it is just and equitable to confirm the unauthorized registration.

The party who is unsuccessful with respect to the registration will receive compensation under the Model Act.

There may be special problems in dealing with the case of a forged mortgage - where, for example. the mortgage when registered indicates one sum to be owing or secured, the mortgage is purchased on a forged transfer of mortgage for another sum, and the debt actually owed is, because of payments made on the mortgage, yet another amount.

CHAPTER 4

CONCLUSION

This Discussion Paper has described the origin and purposes of the Joint Committee's Report and the proposed Model Land Recording and Registration Act, and described some (but not all) of their content.

The Model Act is built upon experience under the existing *Real Property Act* but seeks to make more explicit the underlying principles and structure of the current system as it has developed over time, and to clarify or resolve some matters that are at present unclear or, for various reasons, unsatisfactory.

Provisionally, it is the view of the Commission that it is desirable and useful to replace the existing Act with new legislation framed on the basis of the Joint Committee's Report and, if it is possible, to achieve substantially similar titles and recording legislation in a number of Canadian jurisdictions.

However, the Commission recognizes that the subject is large, complex and important; that the Model Act does not address all the detailed provisions of the current *Real Property Act*; and that such important, substantial and long-standing law should not be altered without thorough consideration.

For these reasons, the Commission will welcome from readers, once they have had the opportunity to examine the full Report of the Joint Committee, comments and recommendations concerning the proposed Model Act.